Supreme Court, U.S.
FILED
DEC 27 2010
OFFICE OF THE CLERK

NO. 10-903

IN THE

SUPREME COURT OF THE UNITED STATES

DARRELL G. OBER
Petitioner

COMMISSIONER JEFFREY B. MILLER; LT. COLONEL RALPH PERIANDI; MAJOR LEONARD MCDONALD' LT. JOHN BROWN; MAJOR CHARLES SKURKIS; CORPORAL ROBERT MRGICH; JACK LEWIS; MAJOR COLEMAN J. MCDONOUGH; CAPTAIN ROBERT TITLER; JOANNA REYNOLDS
Respondents

ON PEITITON FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Don Bailey, Esquire
PAID# 23786
4311 N. 6th Street
Harrisburg, Pa 17110

QUESTIONS PRESENTED

1. Whether the trial Court violated the applicable Standard of Review.

Suggested Answer Yes!

2. Whether Ober violated any interests by talking with his attorney?

Suggested Answer Yes!

3. Whether Ober suffered retaliation for exercising his right to seek the advice of counsel?

Suggested Answer Yes!

4. Whether Ober made out claims of his federally guaranteed rights?"

Suggested Answer Yes!

LISTS OF PARTIES

All parties have been listed in the caption hereto.

CORPORATE DISCLOSURE STATEMENT

This document is not subject to any provisions of Supreme Court Rule 29.6.

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The Opinion of the Third Circuit Court of Appeals was filed on September 27, 2010 (App1A-3A), App A. Memorandum and Opinion of the Honorable Christopher C. Conner was filed on July 21, 2008 (App4A-12A), App B.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, for which review is sought, was filed on September 27, 2010, (App A).

CONSITTUITIONAL PROVISION INVOLVED

The 1st Amendment to the U.S. Constitution is implicated in this case.

The 14th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows... nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Darrell Ober is an ex-Pennsylvania State Police Officer who was court-martialed solely because he consulted his attorney Don Bailey Esquire about a matter being litigated in the Third Circuit Court of Appeals at the time. This matter affected him directly. Ober was d^ of the brightest and best. A captain in the Pennsylvania State police who was on a fast track to success. As a temporary director of the internal affairs division he was contacted by the Federal Bureau of investigation and was asked to keep certain matters in confidence while an FBI investigation was underway. The matter affected the leadership i.e. Ober's superiors in the PSP. Complying with PSP regulations Ober confided in his immediate supervisor (who Ober knew could not have been involved in the selling of Academy appointments) who gave him a direct order to wait until the FBI had completed their work. The problem presented was one of avoiding tipping off a potential target of the investigation. Ober did as ordered and to avoid violating the criminal law cooperated with the FBI. Shortly after Ober reported this matter to the Commissioner of the PSP (after the FBI had concluded their probe) his life and his career became a living hell. Ober was unlawfully transferred and unlawfully disciplined. After an appeal to Pennsylvania's Commonwealth Court, where he was successful, the retaliation continued and augmented. Suffering repeated acts of retaliation by his superiors Ober hired attorney Don Bailey who filed a civil rights suit (First Amendment) on his behalf. The Hon. William Caldwell

dismissed the 12 B6 motions filed against him by the PSP defendants but Ober's case ended up going to the Hon. Christopher C Connor or Ober where he did not fare so well.

After his case was dismissed by Judge Connor he appealed to the Third Circuit Court of Appeals. The Third Circuit Court of Appeals (this was pre-*Garcetti*) found that Ober had not engaged in protected speech (although he clearly had no duty to report the FBI investigation to anyone) and Ober then suffered an absolutely incredible litany of retaliations from the PSP hierarchy. District Court Judge Connor dismissed Ober's follow-on underlying complaint which is the subject of this petition. Judge Connor's opinion was upheld by the Third Circuit Court of Appeals. Ober had his office surreptitiously searched along with his computers because his superiors believed that he was the source of leaks to a Philadelphia newspaper (this was totally false). In addition Ober's superiors i.e. the defendants below, believed that Ober's attorney Don Bailey was or could be the source of leaks to the newspaper. Not a scintilla of evidence has ever existed that Bailey or Ober leaked anything to any news source at any time and the facts below are supportive of the circumstances because they never did. Meanwhile Ober was made the object of a plan to skewer his employee evaluations, was moved to a desk in the middle of the PSP dog compound, and was also the victim of blatant and unequivocal perjury during the underlying civil process by then Pennsylvania State police Deputy Commissioner Ralph Periandi. The trial court saw no retaliation in any of this for any reason. After an exhaustive investigation into Ober and virtually

everything he did and said for roughly 2 years the Pennsylvania State police defendants below did not have a scintilla of evidence to indicate that Darrell Ober had done anything wrong. One focal point was an internal report done by Ober (which he was duty bound to do) which demonstrated corruption on behalf of the Pennsylvania State police Commissioner Jeffrey B Miller. Miller had violated numerous PSP regulations and cooperating with a Pennsylvania State Sen. named Vincent Fumo from Philadelphia. Fumo was engaged in not only illegal sales of liquor licenses but he was aided in his political opposition, for purely political purposes, to certain Philadelphia ward leaders by Miller. Ober had a duty to report this, but at the time, the case of Ober v Evanko, was in litigation. The issue involved were the duties and responsibilities of a PSP member to report corruption and to who. The PSP had argued before the Third Circuit that a PSP member had a duty to report corruption directly to his next supervisor even if that supervisor was the corrupt person involved. Failure to do so (as later found by the Third Circuit panel) subjected the PSP member to any mistreatment his superiors desired because according to the Third Circuit he was not engaged in protected speech if he went outside his chain of command. In short the PSP had successfully argued this holding which to a great degree became ensconced in Garcetti later on.

Regardless this matter had not yet come down in opinion form from the Third Circuit. Miller's improper activities were so blatant that Ober who had been victimized so many times suspected among other things that he might be the object of a setup among other things. The investigatory issues were hardly

matters of great concern. It was a simple case of influence peddling and certainly didn't involve national security or significant concerns of public safety health or welfare. Ober did a concise and detailed report and based upon counsel's advice (Don Bailey) he reported directly to his immediate supervisor. Totally devoid of any basis upon which to attack Darrell Ober he was court-martialed simply because he sought his attorney's advice on the matter which was cogent and current in which directly affected his legal status as a PSP member.

Ober was court-martialed because he sought in attorney's advice. The memorandum opinion written by the Hon. Christopher C Connor does not address the First Amendment issues raised by Ober in his complaint and in the litigation. It is clear that Ober was retaliated against because he appealed the retaliation he had suffered as a result of performing his duties in a proper manner. These facts were never mentioned by the trial court and if the Third Circuit performed a de novo review as is the standard of review which they are required to follow they were not addressed by the Third Circuit Court of Appeals.

Such matters, whether fortunately or unfortunately, do not rise to a level where they can be considered by this Court i.e. this Court could not perform its duties merely by addressing de novo reviews of purported underlying injustice. But in this case because they involve a unique holding denying an American citizen (by virtue of his being a law enforcement officer) the right to seek legal advice on the pretext that he had disclosed" confidential" information to his attorney. In a blatant active

retaliation Ober was court-martialed even though there was no confidential information disclosed to his attorney as a matter of fact. Ober had merely discussed with his attorney the reporting of the information (and never the details) to his superior. For this he was court-martialed and his career was destroyed. The trial court and the Third Circuit Court of Appeals found that Ober had engage in unprotected speech when and because he sought his attorney's advice.

REASONS FOR GRANTING THE WRIT

In order to protect the constitutional guarantee of meaningful access to the courts, an individual must have an unfettered ability to communicate with his attorney in order to ascertain his legal rights and keep his counsel fully informed in this regard. The communications at issue in the present case is clearly protected for those reasons. Ober had consulted his attorney to ascertain what he should do about reporting, both internally and externally, the blatant corruption engaged in by the Commissioner of the Pennsylvania State police in his complicity with Sen. Fumo. His attorney's advice was to reported internally to his immediate superior because this is how the Pennsylvania State police that argued before the Third Circuit Court of Appeals (who was obviously disposed to give the Pennsylvania State police what they requested) Ober reported this information to no one else. The Pennsylvania State police do not dispute that they court-martialed Ober because he sought his attorney's advice. See *Martin v. Lauer, 686F.2d24 (D.C Cir. 1982)*. The issue before this Court is a very

simple one. Can a PSP officer seek the advice of his attorney regarding the reporting process particularly when that process is that question before the courts without subjecting himself to the dangers of engaging in unprotected speech? This issue places our entire nation at risk. When or how does any person determine when and about what, they should limit or avoid discussing with their attorney. In this case merely because Ober consulted his lawyer he was court-martialed. Ironically there's absolutely no evidence that either Ober or his attorney ever disclosed anything to anyone simply because they never did. Making a citizens decision to consult his lawyer a viable source of lawful retaliation by employers in law enforcement implicates the First Amendment to the U.S. Constitution as well as possibly even the sixth and seventh.

CONCLUSION

For the afore-stated reasons this court should review this matter and render its judgment on what circumstances if any limit the right of an American citizen to consult with the lawyer of his choice.

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APPENDIX B
Third Circuit Court of Appeals Opinion
Dated September 27, 2010.

DARRELL G. OBER
Appellant

COMMISSIONER JEFFREY B. MILLER; LT. COLONEL RALPH PERIANDI; MAJOR LEONARD MCDONALD' LT. JOHN BROWN; MAJOR CHARLES SJURKIS; CORPORAL ROBERT MRGICH; JACK LEWIS; MAJOR COLEMAN J. MCDONOUGH; CAPTAIN ROBERT TITLER; JOANNA REYNOLDS
Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania
No 1:04-CV-1669
District Judge: Honorable Christopher C. Conner

Submitted Pursuant to
Third Circuit LAR 34.1(a)
September 20, 2010

Before: McKee, Chief Judge, Ambro and Chagares, Circuit Judges.
(Opinion Filed: September 27, 2010)

OPINION

MCKEE, Chief Judge

Darrell Ober appeals the district court's dismissal of the action he brought under 42 U.S.C. §1983 in which Ober alleged that the defendants illegally retaliated against him for exercising his First Amendment rights of free speech. We will affirm.

In his "Statement of Questions Presented," Ober raises the following four claims: "(1) Whether the trial Court violated the applicable Standard of Review; (2) Whether Ober violated any interests by talking with his attorney? (3) Whether Ober suffered retaliation for exercising his right to seek the advice of counsel? [and] (4) Whether Ober made out claims of his federally guaranteed rights?" Appellant's Br. at 2.

We exercise plenary review over the district court's grant of summary judgment in favor of the defendants, and apply the same test the district court should have applied. *Hill* v. *City of Scranton,* 411 F.3d 118, 124 (3d Cir. 2005). We therefore must review the record as a whole, "draw[ing] all reasonable inferences in favor of the non-moving party," without making credibility determinations or weighing the evidence. *Id.*

Although some of the issues presented in the "Statement of Questions Presented" are

less than clear, it is clear that Ober is arguing that the district court erred in numerous ways in granting summary judgment to the defendants and dismissing his complaint.

We have reviewed this record and the thorough and well reasoned Memorandum filed by the district

court on December 18, 2007, addressing the merits of Ober's claim, as well as the equally well reasoned Memorandum filed on July 21, 2008, addressing the Defendants' renewed motion for summary judgment. *See* App. 18-68, 70 to 78. Although Ober's brief is quite dismissive of the district court's analysis, we believe there is little that we can add to that court's thoughtful explanation of why the Defendants are entitled to judgment as a matter of law. We will therefore affirm the district court's grant of summary judgment substantially for the reasons set forth by the district court in its thoughtful Memoranda.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

DARRELL G. OBER — No. 1:04-CV-1669
Judge Conner

Plaintiff

VS.

COMMISSIONER JEFFREY B. MILLER; LT. COLONEL RALPH PERIANDI; MAYOR LEONARD MCDONALD; LT COLONEL JOHN BROWN; MAJOR CHARLES SKURKIS; CORPORAL ROBERT MRGICH; MAJOR COLEMAN J. MCDONOUGH; JACK LEWIS; JOANNA REYNOLDS; and CAPTAIN ROBERT TITLER

Defendants

MEMORANDUM

This is a § 1983 civil rights action filed by Darrell Ober ("Ober"), a former captain with the Pennsylvania State Police ("State Police"), against nine State Police employees. The majority of Ober's claims were resolved in this court's memorandum and order dated December 18, 2007. (See Doc. 84.) However, defendants failed to assert an argument in support of their request for relief with respect to Ober's declaratory judgment claim in their original motion for summary judgment. Therefore, this court denied defendants' motion with respect to the declaratory judgment claim, but granted defendants

the right to file a renewed motion for summary judgment addressing the declaratory judgment claim. (See id. at 8.) Presently before the court is defendants' renewed motion for summary judgment. (Doc. 86.) The motion has been fully briefed and is ripe for disposition. For the reasons that follow, defendants' motion will be granted.

I. Statement of Facts[1]

In July 2003, Ober prepared a memorandum that detailed what he believed to be acts of public corruption committed by defendants Colonel Jeffrey B. Miller ("Miller") and Lieutenant Colonel Ralph Periandi ("Periandi"). Specifically, the memorandum contended that these State Police officials used their power and influence to aid a state senator in attacks against a political enemy. (See Doc. 87 111; Doc. 96 U 1.) Ober retained a private attorney, Don Bailey, Esquire ("Attorney Bailey"), to review his memorandum to ascertain whether its contents met the legal definition of public corruption, and, if so, how best to distribute the information. (Doc. 84 at 9.) On advice of counsel, Ober submitted the memorandum to his immediate supervisor, defendant Major Leonard McDonald, who attempted to persuade Ober not to distribute the memorandum. (Id.) Defendant Captain Robert B. Titler ("Titler"), the State Police disciplinary officer, found that Ober had violated Field Regulation 1-1.05 ("FR 1-1.05") by divulging the confidential information contained within the memorandum to an unauthorized individual, namely, Attorney Bailey. (See Doc. 87 H 12; Doc. 96 H 12.)

[1] A thorough recitation of the facts of the above-

captioned case is set forth in the memorandum and order dated December 18, 2007 (Doc. 84), familiarity with which is presumed.

Titler concluded that due to Ober's violation of the regulation, criminal and administrative investigations had been compromised and the safety of officers had been endangered. (See Doc. 87 1112; Doc. 96 H 12.) FR 1-1.05 prohibits State Police members from dispersing "any confidential information of the [State Police] or its members, without proper authority." (See Doc. 87 U 12; Doc. 96 II12.) The regulation defines "confidential information" as information which, if disclosed, could:

a. Endanger a member, or any other person.
b. Impede a just disposition of a case ...
f. Compromise or negate the judicial process ...
h. Make known the contents of an internal or criminal investigation record or report to an unauthorized person

(See Doc. 87 1114; Doc. 96 1114.) Because Ober's discipline was premised on his disclosure of confidential information to an attorney, Ober alleges that **FR 1-1.05** prohibits members of the State Police from consulting with attorneys to seek legal advice in violation of the First Amendment's guarantees of freedom of speech, association, and petition. (See Doc. 95 at 3, 5.)

II. Standard of Review

Through summary adjudication the court may dispose of those claims that do not present a "genuine issue as to any material fact" and for which a jury trial would be an empty and unnecessary

formality. See FED. R. CIV. P. 56(c). It places the burden on the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. Pappas v. Citv of Lebanon. 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); FED. R. CIV. P. 56(e); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89 (1986); see also FED. R. CIV. P. 56(c), (e). Only if this threshold is met may the cause of action proceed. Pappas, 331 F. Supp. 2d at 315.

III. Discussion

Ober's amended complaint seeks a declaration that FR 1-1.05 violated his First Amendment right to seek legal counsel.[2] (See Doc. 10 1IH 135-151.) To determine whether Ober's communications with Attorney Bailey were protected by the First Amendment, the court "must ascertain (1) whether the speech was on a matter of public concern; and (2) if it was, whether the government's interest in efficiency or effectiveness outweighs the value of the speech." Cipriani v. Lycoming County Hous. Auth., 177 F. Supp. 2d 303, 321 (M.D. Pa. 2001); see also Pickering v. Bd. ofEduc. 391 U.S. 563, 568 (1968) (stating that, in adjudicating a public employee's right of free speech, "a balance [must be found] between the interests of [2] "The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech,

association and petition." Cipriani v. Lycoming County Hous. Auth.. 177 F. Supp. 2d 303, 321 (M.D. Pa. 2001) (quoting Denius v. Dunlap, 209 F.3d 944, 953 (7th Cir. 2000)); see also Barry v. Luzerne County. 447 F. Supp. 2d 438, 448 (M.D. Pa. 2006).

the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). For purposes of the instant motion, defendants do not dispute that Ober's memorandum addressed an issue of public concern. (See Doc. 97 at 4-8); see also Feldman v. Phila. Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994) (stating that "[disclosing corruption, fraud, and illegality in a government agency is a matter of significant public concern").

The dispositive question in the instant case is whether Ober's interest in communicating with his attorney outweighed the State Police's interest in maintaining the confidentiality of information regarding a current investigation. See Pickering, 391 U.S. at 568. Having carefully reviewed the evidence of record, the court finds that Ober has failed to prove that the balance of interests tips in his favor. The State Police has a significant interest in maintaining the integrity of its investigations as well as protecting the safety of its officers and members of the community. See Green v. Phila. Hous. Auth.. 105 F.3d 882, 888-89 (3d Cir. 1997); see also Meenan v. Harrison, 264 F. App'x 146, 151 (3d Cir. 2008) (stating that "courts have given law-enforcement agencies wide latitude to regulate an employee's speech when that speech impacts areas

such as discipline, morale, and uniformity within the force"); Perisco v. City of Jersey City. 67 F. App'x 669, 674 (3d Cir. 2003) (citing the police department's "substantial interest in maintaining its rules and regulations"). In the instant case, Ober's disclosure of the confidential information had the potential to compromise criminal and administrative investigations and to jeopardize the safety of officers. (See Doc. 87 1112; Doc. 96 1112.) In fact, as defendants note, these dangers were realized in the instant case when the information contained in Ober's memorandum was leaked to the media. The source of the leak remains undetermined, which underscores the need for tight restrictions on the distribution of confidential information. Once confidential information has been disseminated to an outside source, it becomes next to impossible for the State Police to determine the source of a leak and to institute the appropriate punishments for the wrongdoer. Considering the potential threats to investigations and to officer safety that may result from unauthorized leaks, the State Police's interest in preventing the disclosure of confidential information to any outside source is substantial.

In contrast, Ober's interest in divulging confidential information to his attorney is less significant. An individual has a legitimate interest in consulting with an attorney about his or her legal rights and remedies. Cipriani, 177 F. Supp. 2d at 321. However, Ober's right to consult with his counsel in the instant case is markedly reduced by the circumstances underpinning the disclosure at issue. Ober does not contend that FR 1-1.05 prohibited him

from disclosing the *issue of public concern*, namely, the alleged corruption of Miller and Periandi, to his attorney. Instead, he contends only that he was prevented from divulging the *confidential information* contained within the memorandum to his attorney. Ober could have adequately informed his attorney of the situation without exposing critical information, such as names, places, and dates, which were not necessary to his attorney's determination of whether the incident amounted to public corruption. See Jacobs v. Schiffer, 204 F.3d 259, 265-66 (D.C. Cir. 2000) ("[T]he First Amendment does not provide a federal employee seeking legal advice regarding a dispute with the employing agency with *carte blanche* authority to disclose any and all confidential government information to the employee's attorney."). Furthermore, FR 1-1.05 only prohibits State Police officials from divulging information to third parties without seeking prior permission from the proper authority. (Doc. 87 1114; Doc. 96 U 14.) Ober did not even attempt to receive permission for Attorney Bailey to view the confidential information. (See Doc. 87 H 4; Doc. 96 11 4.) Had he utilized the appropriate avenues of relief provided by FR 1-1.05, Ober may have been permitted to disseminate the confidential information to his attorney. Having failed to fully exhaust such avenues of relief, Ober cannot now claim that the regulation violated his First Amendment rights.

Ober relies heavily on Martin v. Lauer, 686 F.2d 24, 30-35 (D.C. Cir. 1982), for the proposition that the balance of interests tips in his favor in the instant case. In Martin, the Office of Juvenile

Justice and Delinquency Protection ("OJJDP") instituted a reduction in force program. When several employees retained counsel in response to the program, the OJJDP administrator issued a memorandum that imposed various "legal restrictions" on the employees' rights to disseminate OJJDP information to their attorneys. LI at 27-28. Amongst the restrictions were an absolute prohibition on providing any OJJDP "information or documents" to an attorney and a requirement to inform the administrator of any such communications with an attorney that had preceded the memorandum. Id. After balancing the competing interests, the court held that such a broad restriction designed to "protect the government's unclear interest in monitoring all discussions [of OJJDP information] cuts too deeply into the employee's first amendment rights." Id. at 34-35.

Martin is factually distinguishable from the action *sub judice* in a number of key respects. First, Martin involved a non-law-enforcement agency, which would not be afforded the same "wide latitude to regulate an employee's speech" as would the State Police in the instant case. See Meenan, 264 F. App'x at 151; see also U.S. Department of Justice Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, http://ojjdp.ncjrs.org (last visited July 18, 2008) (stating that the OJJDP is designed to "develop and implement effective programs for juveniles" rather than to serve as a law-enforcement agency). Second, in contrast to the OJJDP's "unclear interest" in nondisclosure in Martin, the State Police has a clear and substantial

interest in preventing the disclosure of confidential investigatory information in the instant case. 686 F.2d at 34-35. Third, the provision at issue in Martin *expressly* prohibited the affected individuals from communicating with attorneys and *affirmatively* required them to reveal any prior communications they had made to attorneys, while FR 1-1.05 contains no similar requirements. Id. at 27-28. Finally, the prohibited communications in Martin extended to *all* "information or documents" concerning the OJJDP, not just ***confidential, investigatory information*** **as in the instant case. Id. In sum,** Martin involved the balancing of an "unclear" governmental interest against an overbroad restriction on speech, while the instant case involves the balancing of a substantial governmental interest against a narrowly-tailored speech restriction. Accordingly, the court finds that Martin does not compel the result sought by Ober. The court will grant defendants' renewed motion for summary judgment. An appropriate order will issue.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: July 21, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

DARRELL G. OBER — No. 1:04-CV-1669
Judge Conner

Plaintiff

VS.

COMMISSIONER JEFFREY B. MILLER; LT. COLONEL RALPH PERIANDI; MAYOR LEONARD MCDONALD; LT COLONEL JOHN BROWN; MAJOR CHARLES SKURKIS; CORPORAL ROBERT MRGICH; MAJOR COLEMAN J. MCDONOUGH; JACK LEWIS; JOANNA REYNOLDS; and CAPTAIN ROBERT TITLER

Defendants

ORDER

AND NOW, this 21st day of July, 2008, upon consideration of the renewed motion for summary judgment (Doc. 86), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The renewed motion for summary judgment (Doc. 86) is GRANTED.

2. A revised pretrial and trial schedule shall BE issue by future order of court.

S/ Christopher C. Conner

No. 10-903

FEB 11 2011

In The
Supreme Court of the United States

DARRELL G. OBER,

Petitioner,

v.

COMMISSIONER JEFFREY B. MILLER, et al.,

Respondents.

On Petition For A *Writ Of Certiorari*
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a law enforcement agency may narrowly limit its members' right to consult with privately retained counsel in order to prevent disclosure of the agency's confidential investigative information.

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's rigorous analysis does not conflict with a decision of this Court or a Court of Appeals and where the ruling does not implicate an important federal question that has not been settled by this Court.

LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Third Circuit:

1. Darrell G. Ober, Petitioner and Appellant below.

2. Jeffrey B. Miller, Respondent and Appellee below.

3. Ralph Periandi, Respondent and Appellee below.

4. Leonard McDonald, Respondent and Appellee below.

5. John Brown, Respondent and Appellee below.

6. Charles Skurkis, Respondent and Appellee below.

7. Robert Mrgich, Respondent and Appellee below.

8. Coleman J. McDonough, Respondent and Appellee below.

9. Jack Lewis, Respondent and Appellee below.

10. Joanna Reynolds, Respondent and Appellee below.

11. Robert B. Titler, Respondent and Appellee below.

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PENNSYLVANIA STATE POLICE FIELD REGULATION INVOLVED – FR 1-1.05

1.05 DISSEMINATION OF INFORMATION

A. Members shall not disseminate, in any manner, any confidential information of the Department or its members, without proper authority. For the purpose of this regulation, confidential information shall be defined as information which:

1. The disclosure thereof could:

a. Endanger a member, or any other person.

b. Impede a just disposition of a case.

c. Aid a person to escape arrest.

d. Delay the apprehension of a criminal.

e. Permit the removal of stolen property or evidence by a suspect.

f. Compromise or negate the judicial process.

g. Violate a statute of the United States or this Commonwealth pertaining to the release of designated confidential information.

h. Make known the contents of an internal or criminal investigation record or report to an unauthorized person.

2. Would identify a person who is acting as a confidential informant; however, members may divulge such identity to other members when it is authorized by proper authority and necessary in the performance of police work.

STATEMENT OF FACTS

A. Factual Background

In July 2003, Petitioner Darrell Ober ("Petitioner"), a former Captain in the Pennsylvania State Police ("State Police"), prepared a memorandum ("Memorandum") in which he unilaterally concluded that his superiors Colonel Jeffrey Miller, Commissioner of the State Police, and Lieutenant Colonel Ralph Periandi, Deputy Commissioner of the State Police, purportedly had misused their authority to aid a state senator against a political rival. Petitioner retained private counsel, Don Bailey, Esquire ("Attorney Bailey"), to review the Memorandum. In reviewing the Memorandum with Attorney Bailey, Petitioner disclosed certain confidential investigative information, including the identities of undercover investigators, potential witnesses and suspects. A Philadelphia newspaper ultimately published this confidential investigative information.

State Police Field Regulation 1-1.05 ("FR 1-1.05"), in effect when Petitioner shared this confidential investigative information with Attorney Bailey, prohibits State Police members from disseminating

"any confidential information of the Department or its members, without proper authority." Confidential information was defined as "information which the disclosure thereof could: (a) endanger a member, or any other person . . . (b) impede a just disposition of a case . . . (f) compromise or negate the judicial process . . . (h) make known the contents of an internal or criminal investigation record or report to an unauthorized person." Importantly, FR 1-1.05 does not prohibit a State Police member from seeking the advice of counsel. It merely limits the scope of the communication to protect the confidentiality and integrity of State Police investigations.

After the State Police discovered that its confidential investigative information had been distributed to the media, the State Police attempted to identify the source of the leak. Although the State Police found insufficient evidence to conclude that Petitioner had leaked the information to the press, the State Police concluded that Petitioner violated FR 1-1.05 by disseminating confidential investigative information to Attorney Bailey without authorization. Subsequently, Petitioner was disciplined.

B. Course of Proceedings Below

Petitioner filed an Amended Complaint against members of the State Police on December 22, 2004. In his Amended Complaint, Petitioner sought a declaration that FR 1-1.05 violated his First Amendment right to seek legal counsel. On July 21, 2008, the

District Court granted summary judgment and concluded that Petitioner's interest in communicating with his privately retained attorney did not outweigh the State Police's interest in maintaining the confidentiality of a current investigation, as well as in protecting the safety of its officers and members of the community. On September 27, 2010, the United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment "substantially for the reasons set forth by the district court in its thoughtful Memoranda."

SUMMARY OF THE ARGUMENT

Petitioner fails to offer the required compelling reason to justify review of his Petition for a *Writ of Certiorari*. He cites no conflict among state or federal courts and does not identify an important question that should be settled by this Court. Instead, the Petitioner asks this Court essentially to overturn a substantial body of precedent recognizing that law enforcement agencies have wide latitude to regulate an employee's speech in areas impacting safety, discipline, morale and uniformity within the Force. This request does not support a Petition for a *Writ of Certiorari*. S. Ct. R. 10.

REASONS FOR DENYING REVIEW

I. PETITIONER FAILED TO SATISFY HIS STRINGENT BURDEN TO JUSTIFY THIS COURT'S GRANTING OF HIS PETITION

Petitioner's so-called "compelling" reason for granting review can be reduced to "the District Court got it wrong." In reality, Petitioner offers no reason for review and fails to identify an "important federal question that has not been, but should be, settled by this Court." S. Ct. R. 10(c). Indeed, he vaingloriously frames the question as "our entire nation [is] at risk" if a law enforcement officer is not permitted to seek the advice of his privately retained attorney. Petitioner, however, has mischaracterized the issue. *See* Petitioner's Petition for *Writ of Certiorari* ("Petition") at p. 7. Indeed, as both Courts below have concluded, the subject State Police Field Regulation does not prohibit members from seeking the advice of a privately retained attorney; it merely prohibits members from disclosing "any confidential information of the [State Police] or its members without proper authority."

Further, the Petitioner concedes that no conflict exists among or between the District Courts, Courts of Appeal and state courts of last resort regarding whether his claim is actionable.

II. THE DECISIONS BELOW CORRECTLY APPLIED THE LAW THAT THE STATE POLICE'S INTEREST IN MAINTAINING THE CONFIDENTIALITY OF ITS INVESTIGATIVE INFORMATION OUTWEIGHS THE PETITIONER'S INTEREST IN COMMUNICATING WITH HIS PRIVATELY RETAINED ATTORNEY

In order to determine whether Petitioner's right to consult with counsel is protected, the analysis turns on: (1) whether the speech was a matter of public concern; and (2) if so, whether the government's interest in efficiency or effectiveness outweighs the value of the speech. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). *See also Jacobs v. Schiffer*, 204 F.3d 259, 265-66 (D.C. Cir. 2000) ("[T]he First Amendment does not provide a federal employee seeking legal advice regarding a dispute with the employing agency with *carte blanche* authority to disclose any and all confidential government information to the employee's attorney, but rather that the scope of the First Amendment right is determined by balancing the employee's interests in communication with the government's interests in preventing communication.")

Petitioner argues that his interest in consulting with his attorney (and, in doing so, divulging confidential information) outweighs the State Police's interest in maintaining the confidentiality of its

investigations. This argument lacks any support in the law.

The State Police have a significant interest in maintaining the integrity of their investigations, as well as the safety of their officers and witnesses. FR 1-1.05 is designed to accomplish those ends as it prohibits the dissemination of confidential department information to anyone without proper authority. These interests are well recognized and zealously protected by the lower courts. *See, e.g., Meenan v. Harrison*, 264 F. Appx. 146, 151 (3d Cir. 2008) (stating that "courts have given law enforcement agencies wide latitude to regulate an employee's speech when that speech impacts areas such as discipline, morale, and uniformity within the force"); *Perisco v. City of Jersey City*, 67 Fed. Appx. 669, 674 (3d Cir. 2003) (noting the interest of police department in maintaining rules and regulations); *Oladeine v. City of Birmingham*, 230 F.3d 1275, 1293-94 (11th Cir. 2000) (noting need for order, loyalty, morale and harmony in law enforcement agencies); *Lytle v. City of Haysville, Kan.*, 138 F.3d 857, 867 (10th Cir. 1998) (recognizing the importance of confidentiality to the performance of police officers' duties); *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 888-89 (3d Cir. 1997) (recognizing police department's interest in successfully fighting crime, protecting its officers and members of the community, and protecting its reputation), *cert. denied*, 522 U.S. 816 (1997); *Campbell v. Towse*, 99 F.3d 820, 829-30 (7th Cir. 1996) (recognizing the

need for loyalty in police departments), *cert. denied*, 520 U.S. 1120 (1997); *Moore v. City of Wynnewood*, 57 F.3d 924, 934-35 (10th Cir. 1995) (law enforcement has interest in maintaining discipline and harmony); *O'Donnell v. Barry*, 148 F.3d 1126, 1135-36 (D.C. Cir. 1998) (recognizing that police force requires a special degree of trust and discipline).

Here, the State Police have a well recognized interest in maintaining order within the department, as well as maintaining the confidentiality and integrity of investigations. FR 1-1.05 accomplishes those ends by prohibiting the dissemination of confidential information without authorization. Petitioner's Memorandum (which he shared with his private attorney) identified undercover investigators, potential witnesses and suspects. This obviously sensitive information could have jeopardized officers and compromised ongoing investigations. Accordingly, the State Police's interest in maintaining the confidentiality of such information was substantial. On the other hand, Petitioner's interest in giving this sensitive information to his attorney is far less substantial. As the district court recognized, Petitioner could have sought Attorney Bailey's counsel without exposing any confidential investigative materials of the State Police.

Further, FR 1-1.05 is not a blanket ban on the disclosure of confidential information. Indeed, the Regulation states that such information may be disclosed with permission from a proper authority.

See FR 1-1.05(a). Petitioner failed to seek authority from anyone to release this information. As such, his interest in communicating with his privately retained attorney is greatly outweighed by the State Police's well-recognized interest in maintaining the confidentiality of information regarding a current investigation. *See, e.g., Meenan*, 264 Fed. Appx. at 157 (interest in encouraging cooperating witnesses); *United States v. Thomas*, 58 Fed. Appx. 915, 918-19 (3d Cir. 2003) (recognizing law enforcement's interest in protecting identities of informants).[1]

CONCLUSION

In summary, Petitioner provides no compelling reason to justify review of the lower courts' decisions. For the reasons set forth above, Respondents respectfully request that this Court deny the Petition for a

[1] Petitioner's reliance on *Martin v Lauer*, 686 F2d 24, 30-35 (D.C. Cir. 1982), is misplaced, as that case implicated a non-law enforcement agency's blanket prohibition on all communications with outside counsel concerning a reduction in force program.

Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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